

BEFORE THE
PHYSICAL THERAPY BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

ANDREW J. RAMIREZ
1771 Smoketree Drive
El Centro, CA 92243

Respondent.

Agency No. 1D-2002-62967

OAH No. L2003040008

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California heard this matter in San Diego, California, on July 2, 2003.

Alvin J. Korobkin, Deputy Attorney General, Office of the Attorney General, State of California, represented Complainant Steven K. Hartzell, the Executive Officer of the Physical Therapy Board of California, Department of Consumer Affairs, State of California.

Robert Alan Soltis, Attorney at Law, represented Respondent Andrew J. Ramirez, who was present throughout the administrative proceeding.

On July 2, 2003, the matter was submitted.

FACTUAL FINDINGS

Application History

1. On January 18, 2002, the Physical Therapy Board of California (the Board) received an application from Respondent Andrew J. Ramirez (Ramirez) in which Ramirez sought the issuance of a physical therapist license.

Jurisdictional Matters

2. On July 12, 2002, the Board denied Ramirez' application.

3. On July 29, 2002, Ramirez requested a hearing.

4. On January 24, 2003, Complainant Steven K. Hartzell, the Board's Executive Officer, signed the Statement of Issues in his official capacity. The Statement of Issues and other jurisdictional documents were served on Ramirez.

Ramirez timely filed a Notice of Defense and requested an administrative hearing.

On May 12, 2003, Complainant signed the Amended Statement of Issues, which was served on Ramirez. The new allegations set forth in the Amended Statement of Issues were controverted under Government Code section 11507.

On July 2, 2003, the record in the proceeding was opened. Jurisdictional documents were presented. An opening statement was given. Sworn testimony and documentary evidence was received. Closing arguments were given, the record was closed and the matter was submitted.

Andrew J. Ramirez

5. Ramirez was born on November 16, 1969. He grew up in the Imperial Valley. Ramirez has very supportive parents, an older brother and a younger sister.

In June 1987, Ramirez graduated from Central Union High School in El Centro. He attended Imperial Valley College, receiving an Associate of Science degree in 1991. Ramirez attended California State University, Northridge, from 1991 through 1998. He received a Bachelor of Science degree in Physical Therapy in 1997 and a Master of Physical Therapy degree in 1998.

After completing his college studies, Ramirez worked for about a year as an in-home aide to a stroke victim. Ramirez returned to the Imperial Valley and worked for about two years as a civilian employee at the United States Naval Air Facility in El Centro. Ramirez has since worked as a physical therapy aide.

Ramirez' Alcohol Problems

6. Ramirez was consuming alcoholic beverages to excess by the time he was in high school. In 1988 Ramirez' parents told him that unless he quit drinking, he would have to move out of the family home. Ramirez was afforded the opportunity to participate in a 30-day inpatient alcohol rehabilitation program. Ramirez completed an inpatient rehabilitation program at Scripps-McDonald in San Diego. Ramirez remained abstinent for three years after completing that program, although he did not attend Alcoholics Anonymous meetings and did not work the 12 steps.

In 1991 Ramirez relapsed. He realized he "was in big trouble." Ramirez, a binge drinker, did not consume alcohol on a daily basis, but would on occasion drink 12-15 (or more) beers daily for a couple of days. When Ramirez stopped drinking he did not suffer a

physical reaction to his withdrawal from alcohol. Ramirez was briefly remorseful about his drinking, particularly when it caused him legal difficulties, but he always returned to this harmful behavior. According to Ramirez, he did not sincerely admit to himself that he was addicted to alcohol and that his life had become unmanageable.

7. Ramirez admitted the following factual matters:

A. On May 22, 1994, Ramirez was arrested for driving under the influence of alcohol.

On September 1, 1994, Ramirez was convicted on his plea of guilty of violating Vehicle Code section 231521(b) (driving while having a 0.08% or higher blood alcohol level). The guilty plea was entered in the Superior Court of California, Los Angeles County, Van Nuys Judicial District, in *People of the State of California v. Andrew Jay Ramirez*, bearing Case No. 94D02503.

Ramirez was fined and placed on three years summary probation.

B. On August 5, 1998, Ramirez was arrested for public intoxication and resisting arrest.

On April 5, 1998, Ramirez was convicted on his pleas of guilty of violating Penal Code section 647(f) (public intoxication) and Penal Code section 148(a) (resisting arrest). The guilty pleas were entered in the Municipal Court of California, Imperial County, Brawley Department, in Case No. M52937B.

Ramirez was fined \$150 and served three days in the county jail.

C. On April 4, 1999, Ramirez was arrested for driving without a valid driver's license and resisting arrest.

On April 6, 1999, Ramirez was convicted on his pleas of guilty of violating Vehicle Code section 125000(a) (driving without a valid driver license) and Penal Code section 148 (resisting arrest). The guilty plea was entered in the Municipal Court of California, Imperial County, El Centro Department, in *People of the State of California v. Andrew Jay Ramirez*, bearing Case No. M94391-E.

Ramirez was granted three years summary probation with terms and conditions of probation that included, but were not limited to, serving three days in county jail.

D. On August 3, 2000, Ramirez was cited for driving on a suspended driver license.

On February 26, 2001, Ramirez was convicted on his plea of guilty of violating Vehicle Code section 14601.5(a) (driving on a suspended driver license). The guilty plea

was entered in the Superior Court of California, Imperial County, El Centro Department, in *People of the State of California v. Andrew Jay Ramirez*, bearing Case No. CM-03608-E.

Ramirez was granted three years summary probation with terms and conditions of probation that included, but were not limited to, serving ten days in county jail (to run concurrent with the sentence imposed in Case No. CM 03517 E).

E. On April 25, 2001, Ramirez was arrested for evading an officer, reckless driving and driving when his license was suspended as a result of a high speed chase in which the speed of Ramirez' vehicle approached 100 miles per hour.

On July 12, 2002, Ramirez was convicted on his plea of guilty of violating Vehicle Code section 14601.1(a) (driving on a suspended or revoked driver license with knowledge of such suspension or revocation). The guilty plea was entered in the Superior Court of California, Imperial County, El Centro Department, in *People of the State of California v. Andrew Jay Ramirez*, bearing Case No. CM-06322-E.

Imposition of sentence was suspended and Ramirez was granted five years probation with terms and conditions of probation that included, but were not limited to, the payment of a fine and serving 30 days in county jail.

F. On September 29, 2001, the CHP responded to a report of a hit and run accident involving a Chevrolet Silverado truck that rolled over and sustained major damage. Ramirez was driving the truck at the time of the accident and was intoxicated. After the accident, Ramirez fled the scene and went to his home.

The CHP interviewed Ramirez at his home. Ramirez smelled of alcohol and admitted he had been drinking earlier that evening. He failed a field sobriety test. Ramirez denied any involvement in the traffic accident. Ramirez was arrested.

On July 12, 2002, Ramirez was convicted on his plea of guilty of violating Vehicle Code section 23152(b) (driving while having a 0.08% or higher blood alcohol level) with a prior driving under the influence conviction. The guilty plea was entered in the Superior Court of California, Imperial County, El Centro Department, in *People of the State of California v. Andrew Jay Ramirez*, bearing Case No. CM-07780-E.

Imposition of sentence was suspended and Ramirez was granted five years probation with terms and conditions of probation that included, but were not limited to, the payment of a fine, serving 96 hours in county jail (concurrent with the sentence imposed in Case No. CM-06322), and enrolling in and completing an SB 38 program.

G. On May 1, 2003, Ramirez was stopped by the CHP for speeding and running a red light. The CHP officer noted a strong odor of alcohol about Ramirez, his red eyes and slurred speech. Ramirez admitted he had been drinking beer. Ramirez failed the field sobriety test and was taken to the El Centro Regional Medical Center for a chemical test and was then taken to county jail, where he was charged with driving under the influence of

intoxicating beverages and driving while having a 0.08% or higher blood alcohol level. Ramirez was served with an order suspending his driver license. This matter is pending.

H. While it was established that Ramirez was charged with vandalism in the Municipal Court of California, Los Angeles County, Los Angeles Judicial District, on April 21, 1995, it was not established that Ramirez in fact was involved in the misconduct charged or that he willfully failed to appear for a court appearance in that matter. It was established that there is an outstanding bench warrant for Ramirez' arrest in this matter for an alleged failure to appear at a scheduled court hearing.

Other Matters

8. Ramirez has tried to quit drinking many times. He testified he was in denial concerning his alcoholism until May 1, 2003, the date of his most recent arrest. Between his first drink of alcohol and May 1, 2003, the date he last consumed an alcoholic beverage, Ramirez completed a 30-day inpatient alcohol rehabilitation program, was convicted of at least four alcohol-related offenses, and participated in two separate SB 38 programs (completing one but not the other). In connection with his criminal sentences, Ramirez attended AA meetings in 1981 and AA meetings on and off from 1994 through 2003. He attended SB 38 programs which required one group meeting each week, alcohol education programs and face to face meetings with counselors. For whatever reason, Ramirez did not realize that he had a problem with alcohol and he continued to be a periodic drinker.

While Ramirez was in jail on May 1, 2003, and was discussing his situation with a cellmate (who had given up more than 15 years of sobriety to return to drinking alcohol again, with the result being his arrest and loss of his job with UPS), Ramirez had a moment of clarity. Ramirez realized that so long he continued to continue doing what he had been doing, he would continue realizing the same unhappy consequences. According to Ramirez, he became committed to sobriety with this important realization.

9. By the time of the administrative proceeding Ramirez had managed to accumulate 60 uninterrupted days of sobriety, his longest period of continuous abstinence since he was 21 years old. He attends five or six AA meetings a week. He has completed the first three of the 12 steps of recovery.

Ramirez was proud of what he has recently accomplished, freely admitting that so long as he drank alcohol he was powerless over alcohol and that his life was unmanageable. He plans on getting a sponsor and completing the twelve steps as quickly as possible.

10. Ramirez lives in the family home with his father and mother. Ramirez' father said that he had not seen Ramirez consume any alcoholic beverages in the last 60 days, that Ramirez had become far less angry since he stopped drinking, and that Ramirez regularly attends AA meetings and keeps more "normal" hours.

11. Robert Wilson (Wilson), a retired laboratory manager and businessman, testified that Ramirez has faithfully attended AA meetings in the last 60 days and has "made

a good beginning.” Wilson testified it takes about a year for an individual to achieve permanent character and lifestyle changes.

12. No expert testimony or expert report was offered to establish that Ramirez has used alcohol to the extent or in such a manner that he is a danger to himself or others, or to the extent that his ability to practice physical therapy safely has been impaired.

No expert testimony or expert report was offered to establish that Ramirez’ plan of recovery is a reasonable one or that it will likely meet with success.

13. Ramirez was uncertain about his future in light of the pending criminal action, believing it possible that he will suffer a felony conviction and that he might be incarcerated, but he agreed to the imposition of any terms and conditions of probation if he were to be granted a probationary physical therapy license.

14. Ramirez provided thoughtful, sincere and candid testimony, but as he has demonstrated in the past, actions ultimately speak louder than words.

While Ramirez’ 60 days of continuous sobriety is certainly encouraging, Ramirez’ several efforts to become sober and his broken promises to quite a few courts concerning his resolve to remain sober and his failures to abide with reasonable terms and conditions of probation (e.g. don’t drive on a suspended license, don’t be drunk in public and don’t drive when intoxicated) bring into question Ramirez’ capacity to overcome his alcoholism. Only time will tell.

LEGAL CONCLUSIONS

The Standard of Proof

1. In the absence of a statute to the contrary, the burden of proof is on the applicant for a license or permit to show entitlement to its issuance. *Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1025; *Martin v. Alcoholic Beverage Control Appeals Bd.* (1959) 52 Cal.2d 238.

In the absence of a statute or as otherwise provided by law, the standard of proof is a preponderance of the evidence. Evidence Code section 115.

Applicable Statutory and Regulatory Authority

2. Business and Professions Code section 480 provides in pertinent part:

“(a) A board may deny a license regulated by this code on the grounds that the applicant has one of the following:

(1) Been convicted of a crime. A conviction within the meaning of this section means

a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action which a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.

...

(3) Done any act which if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.

The board may deny a license pursuant to this subdivision only if the crime or act is substantially related to the qualifications, functions or duties of the business or profession for which application is made . . .”

3. Business and Professions Code section 2609 provides as follows:

“The board shall issue, suspend, and revoke licenses and approvals to practice physical therapy as provided in this chapter.”

4. Business and Professions Code section 2660 provides in pertinent part:

“The board may . . . impose probationary conditions upon any license, certificate, or approval issued under this chapter for unprofessional conduct that includes, but is not limited to, one or any combination of the following causes:

...

(d) Conviction of a crime which substantially relates to the qualifications, functions, or duties of a physical therapist or physical therapy assistant. The record of conviction or a certified copy thereof shall be conclusive evidence of that conviction.

...

(i) Conviction of a violation of any of the provisions of this chapter or of the State Medical Practice Act, or violating, or attempting to violate, directly or indirectly, or assisting in or abetting the violating of, or conspiring to violate any provision or term of this chapter or of the State Medical Practice Act . . .”

5. Business and Professions Code section 2239 (included in the Medical Practice Act) provides in pertinent part:

“(a) The use . . . of alcoholic beverages, to the extent, or in such a manner as to be dangerous or injurious to the licensee, or to any other person or to the public, or to the extent that such use impairs the ability of the licensee to practice medicine safely or

more than one misdemeanor or any felony involving the use, consumption, or self-administration of any of the substances referred to in this section, or any combination thereof, constitutes unprofessional conduct. The record of the conviction is conclusive evidence of such unprofessional conduct.

(b) A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this section . . .”

6. Title 16, California Code of Regulations, section 1399.20 provides in part:

“For the purposes of denial . . . of a license, pursuant to Division 1.5 (commencing with Section 475) of the code, a crime or act shall be considered to be substantially related to the qualifications, functions or duties of a person holding a license under the Physical Therapy Practice Act if to a substantial degree it evidences present or potential unfitness of a person to perform the functions authorized by the license in a manner consistent with the public health, safety or welfare. Such crimes or acts shall include but not be limited to the following:

(a) Violating . . . directly or indirectly . . . any provision or term of the Physical Therapy Practice Act.

. . .

(c) Violating . . . any provision or term of the Medical Practice Act.”

Relevant Decisions

7. The legislature determined that a doctor’s personal non-prescribed use of substances represented a sufficient danger to the public to warrant imposing disciplinary sanctions regardless of the availability of evidence that such misconduct in fact impaired the doctor’s professional skill. There is no basis, constitutional or otherwise, for courts to override that legislative determination by imposing a special requirement of “nexus” between the proscribed conduct and professional conduct. *Weissbuch v. Board of Medical Examiners* (1974) 41 Cal.App.3d 924.

8. Business and Professions Code section 2239(a) provides that if a physician sustains two or more misdemeanor convictions involving the consumption of alcoholic beverages, those convictions constitute unprofessional conduct. A logical connection or nexus exists between the convictions and the physician’s fitness to practice medicine. The imposition of license discipline under Business and Professions Code section 2239(a) does not violate the due process and equal protection clauses of the California and United States Constitutions. Because a rational connection exists between convictions involving alcohol consumption and a physician’s fitness to practice medicine, the conclusive presumption of unprofessional conduct from those convictions does not violate the licensee’s right to due process of law. *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757.

9. Emotional or physical difficulties at the time of misconduct which expert testimony establish to be a contributing cause of the misconduct is a mitigating factor so long as the emotional or physical difficulties were not self-induced, for example as the result of recreational substance abuse. To establish rehabilitation a licensee must demonstrate that he or she no longer suffers from these disabilities or, in the alternative, that he or she is under care for such disabilities which will prevent the reoccurrence of any misconduct. See, *Doyle v. State Bar* (1976) 15 Cal.3d 973; see, also, *In re Leardo* (1991) 53 Cal.3d 1.

10. In many cases psychoneurotic problems may underlie professional misconduct and moral turpitude. The primary concern must be the fulfillment of proper professional standards, whatever the unfortunate cause, emotional or otherwise. See, *Grove v. State Bar* (1967) 66 Cal.2d 680.

11. Rehabilitation “requires a consideration of those offenses from which one has allegedly been rehabilitated.” *Pachecho v. State Bar* (1987) 43 Cal.3d 1041. Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933.

12. As Chief Justice Lucas observed, “The amount of evidence of rehabilitation required to justify admission varies according to the seriousness of the misconduct at issue.” *Kwasnik v. State Bar* (1990) 50 Cal.3d 1061.

Cause Exists to Deny the Application

13. Ramirez failed to establish by a preponderance of the evidence that he has rehabilitated himself from several alcohol-related criminal convictions that are substantially and adversely related to the qualifications, functions and duties of a physical therapist. These convictions span the period from September 1, 1994 through July 12, 2002, and a criminal action related to Ramirez’ drinking and driving is pending. By his own admission, Ramirez is powerless over alcohol and he had just 60 days of continuous sobriety at the time of the administrative hearing despite years of warnings from friends and family and numerous ineffective judicial interventions.

This conclusion is based on Factual Findings 6, 7 (subparts A-G) and 8-14 and on Legal Conclusions 1-4 and 6.

14. Ramirez failed to establish by a preponderance of the evidence that he has recovered from his alcoholism or that he has rehabilitated himself to the extent that he can practice safely as a physical therapist. Ramirez was a practicing alcoholic for at least 15 years. He was treated as an inpatient at Scripps-McDonald and received fairly intensive counseling in two separate SB 38 programs. He promised several courts that he would not appear drunk in public and/or would not operate a motor vehicle under the influence of alcohol, promises that were broken due to the unremitting nature of Ramirez’ disease.

While it is sincerely hoped Ramirez has had his last drink, history warns us that Ramirez made similar promises in the past and was unable to keep them. In light of this

discouraging history it would not in the public interest to issue Ramirez a license at this time, even if it were to be issued on a probationary basis and even if it were strictly tied to his abstinence from the consumption of alcohol.

This conclusion is based on Factual Findings 6-14 and on Legal Conclusions 1-6.

ORDER

The application for licensure filed by Andrew J. Ramirez with the Physical Therapy Board of California is denied.

DATED: July 8, 2003

Original signed by James Ahler
JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings